Since reference has been made to the *lis pendens* order it is necessary to point out that whatever may be its legal effect it can only arise in proceedings brought by the purchasers to recover the purchase money from the appellant. The argument by counsel for the respondent rested almost entirely on the possibility of such proceedings being brought by the purchasers. Such possibility had arisen merely because of Mr. Vasudevan's action against the appellant.

Since neither the purchasers nor Mr. Vasudevan was before the court I fail to see why the learned judge should be so concerned about their interests.

On the facts and on the law applicable in these proceedings there was nothing to justify the order directing the money to be deposited into court. The fact that the appellant had already been paid $36,976 as deposit and the fact that $150,000 had been used by the respondent to pay off the mortgages on the lands should be sufficient to show that the appellant has every right to be paid the balance of the purchase money even if the respondent had not given the undertaking. The appellant, in my view had not done anything to be deprived of his right.

I would allow this appeal with costs and direct that the amount $182,200 and all other sums of money which may be payable to the appellant be paid out to him forthwith together with interest at 6% per annum from the date of this order to date of payment.

Appeal dismissed.

Solicitors: *Skrine & Co.; Jayadeva & Zahir.*

SAMIN BIN HASSAN v. GOVERNMENT OF MALAYSIA

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ali F.J.) August 20, 1976]

[Johore Bahru — Federal Court Civil Appeal No. 14 of 1976]

Tort — Negligence — Vicarious liability — Whether driver of vehicle driving as servant or agent of the Government — Whether act within course of employment.

In this case it had been held in the High Court that the driver of a Telecoms Department Land Rover was negligent and thereby caused injuries to the appellant. The learned trial judge also found that at the material time the driver of the Land Rover was not a servant or agent of the Government. At the trial the driver had stated that he took out the Land Rover for a trial run to test its brakes and that in the course of the trial run he had stopped at his house for lunch and that when the accident occurred he was returning to the depot where the vehicle was normally kept. The learned trial judge found that on the evidence there was no defect which made the trial run necessary and that the driver had not obtained the permission of his supervisor to take the Land Rover out. He found as a fact that the driver had taken out the Land Rover for his own purpose which was clearly to go home for lunch and that in doing so he had no permission and was driving on his own and that he was at the material time not driving as a servant or agent of the Government. The appellant appealed to the Federal Court.

Held, dismissing the appeal: the appellate court could not disturb the finding of the learned trial judge and in view of the law applicable, the employers, the Government, were not liable.

Cases referred to:-

(1) *Hilton* v. *Thomas Burton (Rhodes) Ltd. & Anor.* [1961] 1 W.L.R. 705.
(2) *Rose* v. *Plenty* [1976] 1 All E.R. 97.
(3) *Davidson* v. *M'Robb* [1918] A.C. 304, 327.
(4) *Britt* v. *Galmoye & Nevill* (1928) 44 T.L.R. 294.
(5) *Hewitt* v. *Bonvin & Anor.* [1940] 1 K.B. 188.
(6) *Sanderson* v. *Collins* [1904] 1 K.B. 628.
(7) *Harvey* v. *R.G. O'Dell Ltd.* [1958] 1 All E.R. 657, 665.
(8) *Higbid* v. *R.C. Hannett Ltd.* 49 T.L.R. 104.

FEDERAL COURT.

R. Vallipuram for the appellant.

Lim Beng Choon (Federal Counsel) for the respondent.

Suffian L.P.: The question in this appeal is: was the 1st defendant (a Telecoms. Department mechanic) a servant or agent of the Federal Government the 2nd defendant (respondent before us) at the material time?

On June 30, 1970, the plaintiff (appellant before us) was riding his motor cycle along Jalan Endau, Mersing, in the direction of Endau, Johore, when he was run into and knocked down and injured by a Telecoms. Department Land Rover at the 1¼ milestone. The Land Rover was driven by the 1st defendant.

The plaintiff sued the two defendants for damages, alleging that the 1st defendant was negligent and that the 1st defendant was the servant or agent of the Government.

The learned trial judge found that the 1st defendant was negligent and liable. The learned trial judge said that from a starting position on the grass verge outside his house the 1st defendant had made a sharp U-turn without regard to the traffic coming from behind him and he had therefore constituted such an obstruction as to cause the plaintiff to collide into him and fall. This finding of negligence on the part of the 1st defendant has not been challenged.

What however is challenged is the learned trial judge's finding absolving the Government from liability on the ground that at the material time the 1st defendant was not a servant or agent of the Government.

The learned trial judge found the following facts proved. Earlier on the day of the accident the 1st defendant had taken a party of engineers to another place which was in another direction and they had returned to the depot after completion of the work there. The 1st defendant said that thereafter he took out the Land Rover for a trial run to test its brakes and that in the course of the trial run he had stopped at his house for lunch and that when the accident occurred he was returning to the depot where the vehicle was normally kept and that at this time he was still on duty. This evidence was challenged by his immediate superior officer who denied giving him permission to take the Land Rover out for a trial run.

The log book relating to the use of the vehicle contained an entry "Jalan Seri Lalang, kerana menguji berek". The 1st defendant's superior admitted

that he saw this entry when he countersigned the log book at the end of the month and thought that it was a proper entry and he said that he was certain that he had at no time given instruction to take the vehicle out to test its brakes. The log book however showed an erasure and the learned trial judge concluded that the entry was a subsequent entry made for the purpose of buttressing the evidence of the driver and that therefore the Land Rover had not been taken out for a trial run. The learned trial judge found further support for this conclusion in the evidence of the Vehicle Examiner who tested the Land Rover after the collision and found that both the foot and hand brakes were satisfactory. The learned trial judge found that the state of the brakes after the accident disproved that they needed testing, that therefore on the evidence there was no defect which made the trial run necessary and that the 1st defendant had not obtained the permission of his superior to take the Land Rover out. Finally, the learned trial judge found as a fact that the driver had taken out the Land Rover for his own purpose which was clearly to go home for lunch and that in doing so he had no permission and was driving on his own and that he was at the material time not driving as a servant or agent of the Government.

On appeal by the plaintiff it was argued before us that the 1st defendant was then driving as the servant or agent of the Government.

The law is to be found in the following two cases.

In *Hilton* v. *Thomas Burton (Rhodes) Ltd. and Anor.*[1] Diplock J., as he then was, said at page 707 that the true test can best be expressed in these words:

"Was the [negligent driver] doing something that he was employed to do? If so, however improper the manner in which he was doing it, whether negligently or even fraudulently or contrary to express orders, the master is liable. If, however, the servant is not doing what he was employed to do, the master does not become liable merely because the act of the servant is done with the master's knowledge, acquiescence, or permission."

Rose v. *Plenty*[2] is a very recent Court of Appeal decision. There a milkman, Mr. Plenty, was employed by his employers, a dairy company, to go round on a milk float delivering milk to the employers' customers, collecting empty bottles and obtaining payment for the milk. The employers exhibited notices at the milk depot which expressly prohibited the milkman from employing children in the performance of his duties and from giving lifts on the milk float. Contrary to those prohibitions, the milkman invited Rose the plaintiff, a boy aged thirteen, to assist him with the milk round in return for payment. The plaintiff rode on the milk float and helped to deliver milk and return empty bottles to the float. Whilst riding on the milk float, the plaintiff was injured when the milkman drove the float negligently. The plaintiff brought an action for damages for negligence against the milkman and the employers. He obtained judgment against the milkman, but his claim against the employers was dismissed on the ground that the milkman had been acting outside the scope of his employment in employing the plaintiff and carrying him on the float contrary to the employers' instructions. The plaintiff appealed against the dismissal of his claim against the employers.

It was held by the Court of Appeal that at the material time Mr. Plenty the milkman was acting as the servant or agent of his employers and that therefore the employers were liable in damages to the boy.

Lord Denning at pages 100-101 expressed the test as follows: —

"In considering whether a prohibited act was within the course of employment, it depends very much on the purpose for which it is done. If it is done for his employers' business, it is usually done in the course of his employment, even though it is a prohibited act. But if it is done for some purpose other than his master's business, as for instance, giving a lift to a hitchhiker, such an act, if prohibited may not be within the course of his employment."

Lord Denning considered that the course of Mr. Plenty's employment was to distribute the milk, collect the money and to bring back the bottles to the van, that he got or allowed the plaintiff to do part of that business which was the employers' business, and that although prohibited it was conduct which was within the course of his employment, and that therefore the employers were vicariously liable for Mr. Plenty's conduct.

Returning to the facts of this present case, the learned trial judge had found that the brakes of the Land Rover did not require attention, that the 1st defendant had no permission to take the Land Rover out to test its brakes, that the 1st defendant had taken it out in order to go home for his lunch, and that that purpose was his own purpose and not the purpose of the Government.

With respect I do not see how this appellate court can disturb that finding and in view of the law that is applicable, I would dismiss this appeal; the plaintiff to pay the costs of this appeal, and the appellant's deposit to be paid to the Government against their taxed costs.

Lee Hun Hoe C.J. (Borneo): I have read the judgment of the learned Lord President. I agree with it. I would like to add a few words.

Plaintiff/appellant was knocked down and sustained injuries while riding his motorcycle along Jalan Endau, Mersing, by a land rover driven by the 1st defendant, a mechanic and driver of Telecoms. He sued both defendants alleging that the 1st defendant was negligent and that 2nd defendant/respondent was liable for 1st defendant, its servant or agent. The learned judge found 1st defendant to be negligent. This finding has not been challenged. However, the learned judge held that the respondent was not liable for negligence as at the material time the 1st defendant was not driving as a servant or agent of respondent but for his own purpose and was, therefore, not acting in the course of the employment. Against this decision appellant now appeals to this court.

This appeal is concerned with the liability of a master for his servant. The master should shoulder the servant's liability if at the material time the servant was acting in the course of the employment and for the business of the employer. The meaning of the words "in the course of employment" was fully considered by the House of Lords in *Davidson* v. *M'Robb*,[3] the headnotes in the Law Reports read: —

"'In the course of employment' does not mean during the currency of the engagement, but means in the course of the work which the workman is employed to do and what is incidental to it and absence on leave for the workman's own purposes is an interruption of the employment."

In that case Lord Atkinson expressed his view succinctly by saying that: —

"The words 'In the course of his employment' mean, I think, while the workman is doing something he is employed to do. In the case of a sailor who lives on board his ship, or an indoor servant who lives in his master's house, these words would of course cover and include things necessarily incidental to his service there — such as taking his meals, sleeping, resting, etc."

The fact that 1st defendant was using respondent's land rover at the time of the accident does not automatically render respondent liable for negligence. See *Britt* v. *Galmoye & Nevill*[4] and *Hewitt* v. *Bonvin & Anor.*[5] Respondent would be liable if 1st defendant was driving the motor vehicle in the discharge of his duties of service. In *Sanderson* v. *Collins*[6] defendant's coachman, without his knowledge or authority, took out the dog-cart loaned to the defendant by the plaintiff and went for a drive with some friends. They got the worse for liquor and there was a collision with a tramcar. The dog-cart was damaged. Held that the defendant was not liable, as the coachman was not acting within the course of his employment, but was indeed on "a frolic of his own."

In *Harvey* v. *R.G.O'Dell Ltd.*[7] McNair J. said, *obiter*, that a journey to a neighbouring town, if the "primary purpose" was to get a meal and could properly be regarded as incidental to the day's work on which plaintiff was engaged, would be within the scope of employment of workman who was returning to work after buying tools. This statement was relied on by the plaintiff in *Hilton* v. *Thomas Burton (Rhodes) Ltd. & Anor.*[1] There the 1st defendants permitted the workmen to take their lunch and other necessary refreshment with them or to get it at some cafe' or public house, as they chose, and were willing for them to have the use of the van for this or any reasonable purpose of their own. The 2nd defendant, deceased and other workers set out in the van to have tea at a cafe' some eight miles from their work site. As it was late when they reached the cafe' they decided to turn back to collect the other workers at the work site. On this journey from the cafe' to the work site the van overturned while attempting to negotiate a bend, apparently going too fast and out of control, and the deceased was killed. Diplock J., as he then was, held that although the 2nd defendant was driving the van with the permission of his employers, the 1st defendants, he was not at the time doing that which he was employed to do and, accordingly, the 1st defendants were not vicariously liable for his negligent driving.

Diplock J. explained that: —

"McNair J. expressed that view *obiter*, making it quite plain that he was not attempting to lay down a general rule, and I do not doubt that there may be circumstances in which a master is vicariously liable for injury to an employee or to anyone else where his vehicle is being driven for the purpose of obtaining refreshment by his servants while out on work. Indeed, he may expressly or impliedly instruct one of them to drive the others for that purpose."

He went on to express that one must look at the realities of the situation and having dealt with the facts concluded that: —

"This seems to me to be a plain case of what, in the old cases, was sometimes called going out on a frolic of their own. It had most tragic consequences; but it does not seem to me that it is possible to hold (though I would like to do so if I could), looking at the realities of the situation, that on the course of that journey the second defendant was doing anything that he was employed to do. It may be he was using his master's vehicle with his master's permission but as *Higbid* v. *R.C. Hamnett Ltd*[8] shows, that is not enough. The true test is, was he doing something that he was employed to do? I think on the facts of this case, he plainly was not."

Then, there is the recent case of *Rose* v. *Plenty*[2] where contrary to express prohibitions the milkman paid a boy to assist him in his work. In the course of the work the boy was injured as a result of the negligence of the milkman. Dealing with the appeal against the dismissal of the claim, the Court of Appeal held that at the material time of the accident the milkman was acting as the servant or agent of his employers who were, therefore, liable in damages to the boy. Talking about the prohibited act, Lord Denning, in allowing the appeal, stated in his usual clarity and lucidity that: —

"It seems to me that although prohibited, it was conduct which was within the course of the employment; and on this ground I think the judge was in error. I agree it is a nice point in these cases on which side of the line the case falls, but, as I understand the authorities, this case falls within those in which the prohibition affects only the conduct within the sphere of the employment and did not take the conduct outside the sphere altogether."

In this case the learned judge quite clearly did not believe 1st defendant was testing brakes as indicated in the log book. There was erasure in the log book and the learned judge was entitled to infer that the entry was made subsequently purportedly to indicate that 1st defendant was on duty at the time. In any case the log book lacks particulars to establish that the motor vehicle was taken out for a trial run at the time of the accident. There was no necessity for brake testing for after the accident the Vehicle Examiner found both hand and foot brakes were in satisfactory condition. If the accident occurs when a servant leaves the sphere of work and the duties which he is employed to do cease then such accident cannot be said to have arisen in the course of the employment. The learned judge found as fact that "the driver had taken out the vehicle for his own purpose which was clearly to go home for his lunch and that in doing so he had no permission and was driving on his own. He was at the relevant time, therefore, not driving as a servant or agent of the Government."

The facts in *Hilton's case* are much stronger than this case in that despite permission given by the employer for the use of the van the employer was not liable for the negligence of the servant who was not doing something for which he was employed to do. With respect, the learned judge is right to dismiss the claim against the Government. I would dismiss the appeal with costs.

Wan Suleiman F.J. concurred.

Appeal dismissed.

Solicitors: *Reginald Vallipuram & Co.*